Georgia Department of Agriculture

Capitol Square • Atlanta, Georgia 30334-4201

Tommy Irvin
Commissioner

February 7, 2006

The Honorable Jack Kingston
2242 Rayburn House Office Building
Washington, DC 20515

Dear Jack:

I requested the Georgia Department of Law to review the "National Uniformity for Food Act of 2005" and advise me as to the potential impact HR 4167 would have on our regulatory authority to protect Georgia citizens should this legislation pass the U.S. Congress. I have enclosed a copy of the review completed by the Georgia Law Department which concludes that HR 4167, as currently written, will have "substantial" effect upon Georgia's Food Laws. We have contended for quite sometime that this legislation would in fact have a detrimental effect on our ability to adequately protect our State's food supply.

The bill is craftily written to disguise its true effects on our authority to protect consumers. Both vague and broad in scope, this legislation will in reality go far beyond the stated purpose of uniformity. The real effect of this legislation will be the deregulation of the United States food industry.

The United States Food and Drug Administration is neither adequately staffed nor funded to fill in the void that will result should this unfunded mandate be put in place. Now **is not** the time to cut back on our food safety and security when almost every day we hear talk of possible terrorist attacks on our agriculture and food supply network.

I ask you to use your influence to help perfect this legislation so as not to dismantle our food safety and security systems which is currently recognized as one of the best in the world. Thank you for your attention to this very important issue and should you have any questions please do not hesitate in contacting me.

Sincerely,

Tommy

Tommy Irvin

Enclosure (1)

Department of Law
State of Georgia

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February 2, 2006

MEMORANDUM

TO: Thomas Irvin, Commissioner
Georgia Department of Agriculture

Cameron Smoak, Assistant Commissioner
Consumer Protection Division

THRU: John E. Hennelly
Senior Assistant Attorney General

FROM: Timothy J. Ritzka
Assistant Attorney General

RE: Potential Consequences that H.R. 4167, the National Uniformity for Food Act of 2005, on Georgia Laws regulating Food Health/Safety Standards

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This memorandum responds to your request for advice regarding what potential consequences may result if Congress passes H.R. 4167, the National Uniformity for Food Act of 2005 (NUFA). Specifically, your inquiry concerns those laws under the Official Code of Georgia which regulate Food Health and Safety Standards.

Your understanding of the effect of NUFA is that it would summarily pre-empt almost 100 state laws, including the laws of the State of Georgia having to do with carcinogen labeling, seafood safety, and food allergens and additives. Currently, Georgia as well as most other states and local governments may enact legislation to regulate food safety that is stronger than those regulations required by federal law. If NUFA is passed, NUFA would summarily nullify all state and local food safety and labeling laws. It is my understanding that NUFA may be a direct result of California's Proposition 65, adopted in 1986, which has given rise to numerous lawsuits claiming that food manufacturers should be held liable for failure to provide health warnings regarding their products.[1] Currently, sixteen State Attorneys General have all

[1] Proposition 65 provides that anyone who sells a product containing a chemical that California has determined causes human cancer or reproductive toxicity must give consumers a "clear and reasonable warning" regarding that risk.

opposed NUFA as well as the National Association of State Departments of Agriculture.[2]

BACKGROUND

The National Uniformity for Food Act of 2005, which amends the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., is an effort to promote national uniformity in 1) food health and safety standards; and 2) food health and safety warning requirements. NUFA's premise is that safety and efficiency are enhanced if governments at all levels are "on the same page."

Section 2(a) of NUFA addresses food safety standards. NUFA would amend § 403A(a) of the Federal Food, Drug and Cosmetic Act (FDCA), 21 U.S.C. § 341-1(a), by expanding the list of State and local food safety standards that are subject to a national uniformity requirement.[3] Section 2(a) would add such other federal standards as those defining "adulterated" foods (21 U.S.C. § 342), unsafe food additives (21 U.S.C. § 348), and unsafe color additives (21 U.S.C. 379e(a)).

Section 2(b) of NUFA would add a new section 403B to the FDCA, 21 U.S.C. § 341-2, to require uniformity in food safety warnings. Section 403B would prohibit State or local governments from imposing any warning requirement concerning the safety of food, or any component or packaging of the food, unless the requirement is "identical" to a warning requirement prescribed under the authority of the FDCA. Proposed § 403B(b) provides that any existing State or local government food warning that does not meet this "identical" standard (or any existing food safety requirement that does not meet the expanded uniformity standards set out in NUFA § 2(a)) shall remain in effect for 180 days after adoption of NUFA – or longer, if a State petitions for an exemption or for nationwide adoption of its local standard under proposed § 403B(c)(1).[4] Proposed § 403B(d) exempts from the federal food safety and warning uniformity requirements any State requirement "needed to address an imminent hazard to health that is likely to result in serious health consequences or death." Proposed § 403B(e) provides that NUFA is not intended to "affect the product liability law of any State." Proposed § 403(g) makes clear that the Act does not affect such traditional State regulatory activities as issuance of consumer advisories regarding

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[2] Sixteen State Attorneys General include: Alaska, Arizona, California, Connecticut, Hawaii, Iowa, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New York, North Dakota, Vermont, and Wyoming.

[3] Currently subject to a national uniformity requirement are such standards as those concerning nutritional labeling and those issued by the federal government pursuant to § 401 of the FDCA, 21 U.S.C. § 341, concerning the definition and contents for specific types of food.

[4] Proposed § 403B(c)(1)permits FDA to grant a State an exemption from the rules governing nationwide food safety or warning requirements if the State requirement: (A) protects "an important public interest" that would otherwise be unprotected; (B) would not cause the food to be in violation of any applicable requirement or prohibition imposed by federal law; and (C) would not "unduly burden interstate commence."

food sanitation at a restaurant, and "freshness dating, open date labeling, grade labeling, a State inspection stamp, religious dietary labeling, organic or natural designation, returnable bottle labeling, unit pricing, or a statement of geographic origin."

THE COMMERCE CLAUSE AND FEDERAL PRE-EMPTION

The commerce clause of the United States Constitution (Commerce Clause) empowers the United States Congress to "regulate commerce with foreign nations, and among the several states . . . ." U.S. Const. Art. I, § 8, Cl. 3. However, while the Commerce Clause vested in Congress the power to regulate commerce among the states, it did not expressly delineate where Commerce Clause power begins and State authority ends; nor did it explain how to draw the line between what was and what was not commerce among the states.

When Congress has not acted to address a particular issue or activity, the United States Supreme Court recognizes and enforces a "dormant" commerce clause to protect a national free market uninhibited by state imposed trade barriers. The concept of a free market throughout the United States suggests that states should not act for the sole purpose of protecting local commerce from interstate competition. Chester James Antieu, William J. Rich, *Modern Constitutional Law* § 43.22, 2d ed. (1997). In voiding an attempt by a state to promote its own economic advantage by curtailing the movement of articles in interstate commerce, the Supreme Court wrote, "The ultimate principle is the proposition that one state in its dealings with another may not place itself in a position of economic isolation." *H.P. Hood & Sons, v. Du Mond*, 336 U.S. 525, 539 (1949).

The United States Supreme Court explains that the purpose of the Commerce Clause was to create an economic unity of the United States:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation that no home embargoes will withhold his exports, and no foreign state will by custom duties or regulations exclude them. Likewise, every consumer may look to the free competition from each producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id.

However, the Supreme Court also recognizes that States may exercise police powers to safeguard their citizens. At times, laws passed under such authority affect interstate commerce. The United States Supreme Court created a test to determine whether such a law should survive in light of Congress's exclusive constitutional powers.

The United States Supreme Court has laid out the modern legal test to be used in determining whether a state or local law violates the "dormant" commerce clause in several cases. First, a court must determine whether a state or local law or ordinance affects and/or burdens interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137,140-142 (1970). Second, if the court holds that there is such a burden, the court then examines the law to see whether it discriminates against interstate commerce or disrupts required uniformity. If the law discriminates on its face or disrupts required uniformity, or if the practical result of the law leads to discrimination, the law is held to be intentional discrimination and is thus, *per se* invalid. *C & A Carbone v. Town of Clarkston*, 511 U.S. 383, 394 (1994); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Toomer v. Witsell*, 334 U.S. 385, 403-406 (1948); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928) (court may look beyond declared legislative purpose and examine the practical results). When presented with intentional discrimination, the United States Supreme Court will examine whether the state can achieve its purpose with any reasonable less discriminatory means. *E.g.*, *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). If there are no other means, the United States Supreme Court may uphold the law despite its discriminatory effect. Third, if the state or local law neither affects or burdens interstate commerce, nor discriminates intentionally, or no less discriminatory means are available, (i.e. – there is a legitimate local purpose) the UNITED STATES SUPREME COURT will examine whether the incidental burdens on interstate commerce created by the law are outweighed by the putative local benefits the law provides. *Pike*, 397 U.S. at 142; *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

Congress has exercised its Commerce Clause powers to apply uniform nationwide standards to large swaths of our commerce. On some occasions Congress has chosen to adopt requirements that establish a regulatory "floor," with States to impose stricter (but not less strict) requirements than those imposed by the federal government. On other occasions Congress has adopted commercial regulatory requirements from which the states are not free to deviate at all (e.g. most regulations of pension plans, medical devices, commercial airline transportation, labor relations, and pesticide labeling). NUFA is fully consistent with Congress's use of its Commerce Clause powers to impose uniform national regulations whenever Congress determines that such uniformity is necessary to ensure the free flow of commerce, e.g. as in NUFA with respect to food safety and warning requirements.

Moreover, "The Supremacy Clause of Article VI of the Constitution provides that the laws of the United States 'shall be the supreme Law of the Land; . . . anything in the Constitution or Laws of any State to the Contrary notwithstanding.' U.S. Const., art. VI, cl. 2. ... Congress's intent to preempt state law may be explicitly stated in the language of a federal statute or implicitly contained in the structure and purpose of the statute. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, 51 L. Ed. 2d 604 (1977). Bearing in mind this distinction between express and implied preemption, the Supreme Court has identified three types of preemption: (1) express

preemption; (2) field preemption; and (3) conflict preemption. *Wisc. Public Intervenor v. Mortier*, 501 U.S. 597, 604-05, 111 S. Ct. 2476, 2481-82, 115 L. Ed. 2d 532 (1991). 'Express preemption' occurs when Congress has manifested its intent to preempt state law explicitly in the language of the statute." *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1121-1122 (11th Cir. 2004).

NUFA is an example of Express preemption.

NUFA'S EFFECT ON GEORGIA LAWS

The principal issue is what effect will NUFA have upon the current Georgia's food laws as those laws directly affect food safety, labeling and warning requirements. Generally, most of the statutory authority which governs food safety and labeling under the Georgia Code would affect commerce and may be pre-empted by NUFA. My analysis of NUFA is that Congress intends NUFA to preempt the field of warning for food safety and probably labeling as well. Under Georgia law the Commissioner is given broad discretion as to particular labeling for food safety. *See*, "Georgia Food Act", O.C.G.A. § 26-2-20 et seq. Under NUFA the Commissioner would not be free to deviate from the federal labeling requirements for food safety and warning requirements.

NUFA does provide for the State to petition for an exemption or for nationwide adoption of its local standard under § 403B(b) of NUFA. A petition would allow any existing food safety requirement that does not meet the expanded uniformity standards set out in NUFA § 2(a) to remain in effect for at least 180 days or longer. In reality, a petition would merely give Georgia a window to amend its law to be "identical" to the NUFA. However, see footnote 4 of this memorandum for a provision in NUFA that does allow for a narrow exception to the rule.

Therefore, NUFA could have a substantial effect upon the Georgia Food laws due to the pre-emptive effect in regards to regulating the establishment of uniform Health/Safety labeling and warning standards.

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